STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

RICHARD A. BANDSTRA, C. J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DENNIS MICHAEL PERKS,

Defendant-Appellant.
_____/

Supreme Court No. 120899

Court of Appeals No. 237337

Lower Court No. 99-10823FH

LIVINGSTON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This case is before this Court on Mr. Perks' appeal of a Court of Appeals order entered on December 7, 2001, dismissing the trial court's Claim of Appeal for lack of subject matter jurisdiction (13a). On January 31, 2002, Mr. Perks applied for leave to appeal to get his appeal of right reinstated (see Court of Appeals docket entries, 7a). This Court granted leave to appeal on November 19, 2002 (see Order, 14a). This Court has jurisdiction to review the Court of Appeals' order under Const 1963, art 1, § 4; MCL 600.215(3); MCR 7.301(A)(2); and MCR 7.302(C)(3).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS VIOLATE APPELLANT'S RIGHT UNDER MICHIGAN LAW TO AN APPEAL OF RIGHT FROM A PRISON SENTENCE FOLLOWING A CONTESTED PROBATION VIOLATION HEARING?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Dennis Michael Perks pled no contest in the Livingston County Circuit Court to one count of resisting and obstructing a police officer, MCL 750.479; and one count of domestic violence, second offense, MCL 750.81 (see trial court docket entries, 2a). Those offenses occurred on December 16, 1998 (see trial court docket entries, 1a). The trial court sentenced Mr. Perks as a fourth habitual offender, MCL 769.12, on the resisting and obstructing charge to three years probation, with the first six months in jail, and work release after sixty days (see trial court docket entries, 3a). The trial court imposed a concurrent two-year probation sentence on the domestic assault charge (Id).

On August 30, 2001, the trial court, acting on a petition, issued a bench warrant for Mr. Perks' arrest for violating probation (see trial court docket entries, 3a-4a).

The trial court held a contested probation violation hearing on September 21, 2001, at which Mr. Perks and other witnesses testified (see trial court docket entries, 4a-5a). At the conclusion of the hearing, the trial court revoked Mr. Perks' probation and sentenced Mr. Perks on the resisting and obstructing charge as an habitual offender to 6-15 years in prison (see trial court docket entries, 4a; 10/3/2001 Judgment of Sentence, 8a).

Mr. Perks filed a timely request for the appointment of counsel and affidavit of indigency in the trial court on October 5, 2001 (10a). The trial court entered a form Claim of Appeal and Order Appointing Counsel on October 17, 2001 (12a).

On December 7, 2001, the Court of Appeals, on its own motion, dismissed the appeal for lack of jurisdiction, stating in its order:

> The claim of appeal is DISMISSED for lack of jurisdiction because the judgment of sentence dated September 21, 2001, which was based on a plea of nolo contendere to the crime of resisting arrest committed after December 27, 1994, is not appealable as a matter of right. In *People v Kaczmarek*, 464 Mich 478; __ NW2d __ (2001), the Court said that violation of probation is not a crime and a ruling that probation has been violated is not a new conviction. MCL 600.308(2)(d), the implementing legislation for Proposal B, provides that appeals from final judgments based on a defendant's plea shall be by leave. If a determination of probation violation is not the conviction of a crime, then a judgment imposed after such a determination must be based on the underlying crime. Since the judgment is based on the plea to the underlying crime, the appeal must be by leave [12/7/2001 Order, 13a].

On January 31, 2002, Mr. Perks applied for leave to appeal to get his appeal of right reinstated (see Court of Appeals docket entries, 7a).

This Court granted leave to appeal on November 19, 2002 (see Order, 14a).

I. THE COURT OF APPEALS VIOLATED APPELLANT'S RIGHT UNDER MICHIGAN LAW TO AN APPEAL OF RIGHT FROM A PRISON SENTENCE FOLLOWING A CONTESTED PROBATION VIOLATION HEARING.

Issue Preservation

The Court of Appeals raised this jurisdictional issue by dismissing Mr. Perks' claim of appeal on its own motion on December 7, 2001 (see Order, 13a).

Standard of Review

Questions of law involving statutory interpretation and the right to appeal are reviewed *de novo*. See *People v Kaczmarek*, 464 Mich 478 (2001).

Discussion

Pre-Proposal B Law

Before the adoption of Proposal B in 1994, Michigan's Constitution provided for an appeal of right in criminal cases, as follows:

> In every criminal prosecution, the accused shall have the right ... to have an appeal as a matter of right ... [Former Const 1963, art 1, § 20; see 1994 Proposal B, 15a].

In turn, the 1961 Revised Judicature Act provided, in pertinent part:

> (1) The court of appeals has jurisdiction on appeals from the following orders and judgments which shall be appealable as a matter of right:
>
> (a) All final judgments from the circuit court, court of claims, and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court [Former MCL 600.308(1)(a)].

Our Legislature did not further define "final judgment." However, in *People v Pickett*, 391 Mich 305, 312-313; 215 NW2d 695 (1974), this Court held that a sentence imposed after revocation of probation was a final judgment subject to an appeal of right:

> (a) All final judgments from the circuit court, court of claims, and recorder's court, except judgments on ordinance violations in the traffic and ordinance division of recorder's court and final judgments and orders described in subsection (2)....
>
> (2) The court of appeals has jurisdiction on appeal from the following orders and judgments which shall be reviewable only upon application for leave to appeal granted by the court of appeals: ...
>
> (d) A final order or judgment from the circuit court or recorder's court for the city of Detroit based upon a defendant's plea of guilty or nolo contendere.... [MCL 600.308, see 18a].[1]

MCR 7.202(7)(b)(iv), as amended in 1995, states that "[f]or purposes of this subchapter ... "final judgment" or "final order" means ... [i]n a criminal case ... a sentence imposed following revocation of probation" (see complete text of rule, 22a).

In 1998, this Court amended MCR 6.445(H), the court rule on probation revocation, to provide for review following revocation, as follows:

> (1) In a case involving a sentence of incarceration under subrule (G) [following revocation of probation], the court must advise the probationer on the record, immediately after imposing sentence, that
>
> (a) the probationer has a right to appeal, if the conviction occurred at a contested hearing, or
>
> (b) the probationer is entitled to file an application for leave to appeal, if the conviction was the result of a plea of guilty.
>
> (2) In a case that involves a sentence other than incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal [MCR 6.445(H), see 20a].

[1] MCR 7.203(A)(1)(b), as amended in 1994, provides, in pertinent part, that the Court of Appeals "has jurisdiction of an appeal of right filed by an aggrieved party from ... [a] final judgment or final order of the circuit court or the court of claims, as defined in MCR 7.202(7), except a judgment or order of the circuit court ... in a criminal case in which the conviction is based on a plea of guilty or nolo contendere..." (see complete text of rule, 25a).

People v Kaczmarek

People v Kaczmarek, 464 Mich 478 (2001), dealt with a case where the defendant was convicted by a jury of a pre-Proposal B crime, and then, after the enactment of Proposal B, pled guilty to violating probation. In the attempt to persuade this Court that MCR 6.445(H) did not bar an appeal of right, the defendant in that case had argued that the word "conviction" in that court rule referred to the underlying conviction. This Court disagreed with that interpretation, and specifically held that the term "conviction" as used in MCR 6.445(H)(1)(a) and (1)(b) means "probation revocation." *People v Kaczmarek, supra*, at 485.

The defendant in *Kaczmarek* prevailed anyway, because this Court held that MCR 6.445(H) merely implemented Proposal B and could not be used to dismiss a properly filed claim of appeal in a pre-Proposal B case. This Court stated:

> Notwithstanding that interpretation [regarding the meaning of the word "conviction" in the court rule], the defendant is correct that the language of MCR 6.445(H) does not support the dismissal of his appeal. As was indicated at the time it was added, the court rule's new language merely implemented the 1994 amendment of article 1, § 20 of the Michigan Constitution of 1963. 459 Mich cxcviii, cxcix (1998). It cannot be used to dismiss a claim of appeal properly filed under the constitution and the implementing legislation.

This Court further observed that "violation of probation is not a crime, and a ruling that probation has been violated is not a new conviction.... Instead, revocation of probation simply clears the way for a resentencing on the original offense." *Id.*, p 482-483. However, this Court did not overrule the holding in *People v Pickett, supra*, that a sentence following revocation of probation is a "final judgment", nor did this Court hold that MCR 6.445(H) was invalid. Since the release of *People v Kaczmarek, supra*, MCR 6.445(H) remains unchanged and no proposals to change the rule have been made concerning a defendant's right to appeal a probation revocation after a contested hearing.

Statutory Interpretation

This Court should interpret Proposal B in light of the ballot language with which it was presented to the voters. See generally, *Wilkins v Ann Arbor City Clerk*, 385 Mich 670, 691 (1971) ("Courts do not exist in a vacuum. They may take cognizance of facts and events surrounding the passage and purpose of legislation"). Proposal B did not ask the voters to decide whether a defendant's guilty or no contest plea should lock out the right to appeal from a subsequent contested probation revocation hearing. Indeed, the ballot proposal does not even mention probation revocation hearings:

> The proposed constitutional amendment would restrict a criminal defendant who pleads guilty or nolo contendre [sic] (no contest) from appealing his or her conviction without the permission of the court [1994 Proposal B, official ballot wording; 15a].

This Court must also literally enforce the unambiguous language of Const 1963, art 1, § 20 and MCL 600.308 as written. See generally, *People v McIntire*, 461 Mich 147, 152-153 (1999). Simply put, a judgment of sentence resulting from a contested probation revocation hearing, though *chronologically* following the original guilty or no contest plea, is not *based upon* the original guilty or no contest plea, within the meaning of MCL 600.308(2)(d), and is not an appeal by an accused "who pleads guilty or nolo contendere" within the meaning of Const 1963, art 1, § 20. Revocation of probation is based on the consequences of a defendant's post-conviction conduct, and in Mr. Perks' case, the trial court determined that Mr. Perks had violated probation, following a contested hearing and not a plea of guilty or no contest.

If the voters or our Legislature meant that a defendant would have to apply for leave to appeal from any order or judgment entered at any time subsequently to the entry of a guilty plea or no contest plea, they would have said so in those words. They did not. They also did not mention revocation of probation, and this Court should not write in those words.

Policy Considerations

None of the policy reasons behind Proposal B support locking out the right to appeal from a contested probation violation hearing. Proposal B was supposed to cut down on the backlog of cases in the Court of Appeals involving appeals of convictions by defendants who pled guilty or no contest. *People v Bulger*, 462 Mich 495, 503-504 (2000). However, a defendant who appeals from a contested probation revocation hearing is already limited to raising issues arising out of the contested hearing and the resulting sentence. *Pickett, supra.*

For many defendants, there would be no reason to request a trial in order to get a sentence of probation. It would be absurd to require a defendant to demand a bench or jury trial on the underlying charge before being placed on probation, just to ensure that the defendant would have an appeal of right in the event of a subsequent probation revocation and prison sentence after a contested hearing.

Conclusion

Given that both *Pickett* and MCR 6.445(H) remain valid after *Kaczmarek*, there was no basis for the Court of Appeals' December 7, 2001 order dismissing Mr. Perks' appeal for lack of jurisdiction.

For these reasons, the Court of Appeals' reliance on *People v Kaczmarek, supra*, as a basis to effectively dismiss Defendant-Appellant's Claim of Appeal, and requiring Mr. Perks to file an application for leave to appeal, is misplaced. This Court should reverse the December 7, 2001 order of the Court of Appeals and reinstate Mr. Perks' Claim of Appeal.

SUMMARY AND RELIEF

For all of the above reasons, Defendant-Appellant asks this Honorable Court to reverse the December 7, 2001 order of the Court of Appeals, and remand this case to the Court of Appeals to reinstate Mr. Perks' Claim of Appeal.

Respectfully submitted,

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Date: December 30, 2002